IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.696 OF 2006

Abdul @ Aslam Salim Shaikh
presently lodged at
Kolhapur Central Prison,
Kalamba, Kolhapur. ..Appellant
V/s
The State of Maharashtra ..Respondent.

Mr. Abhaykumar Apte, Advocate Appointed for the appellant.
Ms. S.V. Gajre, APP for the State.

CORAM : J.H. BHATIA, J.

DATE : 17TH APRIL, 2007.

ORAL JUDGEMNT

. Heard Mr. Abhaykumar Apte, learned Advocate appointed for the appellant, who is in jail and Mrs. Gajre, learned A.P.P.

2. The present accused, who was accused No.4 along with accused Nos.1 to 3 was convicted for the offence punishable under section 399 and 402 Indian Penal Code and was sentenced to undergo R.I. for five years and to pay fine of Rs.3,000/- and in default to undergo R.I. for six months on each count. He was also convicted for the offence punishable under section 4 r/w section 25 of

Arms Act and was sentenced to undergo S.I. for two years and to pay fine of Rs. 2,000/- and in default to pay fine to undergo further S.I. for six months. The substantive sentence of imprisonment on all counts was to run concurrently. The impugned judgment and conviction was passed on 28/11/2005. The accused/appellant preferred this appeal through jail challenging the conviction and sentence. According to him the trial Court had not scrutinised and appreciated the evidence properly and has committed error in convicting him. He also prayed that the sentence of fine may be reduced.

3. I have carefully gone through the whole evidence and the impugned judgment. I have also perused a report dated 15/4/2007 from the Superintendent, Kolhapur Central Jail, which shows that the accused is likely to be released from jail on 1/5/2007, after undergoing complete sentence, including the sentence of imprisonment in default to pay fine on all the three counts.

4. According to prosecution, on 28/3/2001 P.W.1 Police Constable Rane was on patrolling duty in Zhaveri

Bazar. At about 5.30 P.M. from some informant he got information that six unknown persons had assembled in Trimurti Market, Zhaveri Bazar with intention to commit dacoity. That informant also pointed out those six persons to Police Constable Rane. Constable Rane watched their activities and one of them indicated that "the dacoity was to be committed in the Zhaveri shop on the first floor of Trimurti Market", while another person uttered "let rush of people reduce" but he advised his companion to keep the weapons ready. After this, police constable Rane contacted P.W.5 Assistant Police Inspector Parab and informed him about this information. API Parab went to the spot along with staff members. At about 7 to 7.15 P.M., Police Constable Rane joined them and pointed out the said persons. When the police tried to nab them, two of then ran away but four persons were arrested. From the custody of accused Nos. 1 and 2, two small knives and from the custody of accused No.3 Ismail Shaikh, a chopper were recovered. These weapons were seized. No weapon was found with accused No.4, who is the present appellant. All these four persons were taken in custody. A case was registered. During the investigation, it was revealed that some of the accused

persons were also involved in other criminal cases. After investigation charge-sheet was filed against all four accused persons and charges were framed. Accused pleaded not guilty.

5. On behalf of prosecution in all six witnesses were examined. Relying on the testimony of these witnesses, the trial Court convicted and sentenced all the four accused persons for the offence punishable under section 399, 402 of IPC and for the offence punishable under section 4 r/w section 25 of Arms Act.

6. Taking into consideration the evidence led by prosecution and the fact that the accused appellant is already in custody since 28/3/2001 and as per the report from the Superintendent, Central Jail Kolhapur, the appellant is going to be released shortly after undergoing the complete sentence, including the sentenced awarded for the offence including Arms Act, the learned Counsel for the appellant did not press the appeal to the extent of charges under section 399 and 402 of IPC. However, he pointed out that the conviction under section 4 r/w section 25 of the Arms Act cannot be sustained for two reasons. Firstly,the accused was not

found in possession of any weapon and therefore, he could not be convicted under section 25 of Arms Act. Secondly, the prosecution had failed to produce any evidence that there was any Notification issued by the Central Government under Section 4 of Arms Act banning the possession and carrying of any such weapons.

7. Section 3 of Arms Act Provides that no person shall acquire, have in his possession, or carry any firearm or ammunition unless he holds a licence for that purpose. Section 4 of Arms Act deals with weapons other than the firearms. It reads as follows:-

> *"4.- If the Central Government is of opinion that having regard to the circumstances prevailing in any area it is necessary or expedient in the public interest that the acquisition, possession or carrying of arms other than firearms should also be regulated, it may, by notification in the Official Gazette, direct that this section shall apply to the area specified in the notification and thereupon no person shall acquire, have in his possession or carry in that area arms of such class or description as may be specified in that notification unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder."*

From this section it is clear that while for firearms in view of the provisions of section 3 of Arms Act, it is

necessary to hold a valid licence normally no licence is required to possess any arms other than the firearm unless there is a Notification published in the Official Gazette by the Central Government for that purpose and made applicable to the particular area specified in the notification. If such a notification is issued for a specified area no person may acquire, posses or carry any such weapon, without necessary licence. Before a charge under section 4 r/w section 25 (1B) of the Arms Act could be framed, it was necessary for the prosecution to allege that there was such a notification issued by the Central Government made applicable to the particular area in which the accused persons were found. In the present case in the charge-sheet nowhere there is any mention of any such notification under section 4 of the Arms Act, nor any evidence was led before the Court that there was any Notification issued by the Central Government prohibiting possession or carrying of any such weapon in particular area. In absence of any such Notification, merely because a persons is found in possession of a weapon, other than the firearms, he cannot be prosecuted, convicted and sentenced under section 25 of the Arms Act.

8. Section 25 (1B) of the Arms Act Provides as follows:-

> *"(a).-acquires, has in his possession or carries any firearm or ammunition in contravention of section 3.*
>
> *(b).- acquires, has in his possession or carries in any place specified by notification under section 4 any arms of such class or description as has been specified in that notification in contravention of that section.*
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> *(c).-....*
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> *(d).-....*
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> *(e).-....*
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> *(f).-....*
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> *(g).-....*
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> *(h).-....*
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> *(i).-....*
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> *shall be punished with imprisonment for a term which shall not be less than one year but which may extend to three years and shall also be liable to fine."*

9. In view of these provisions it is clear that only the person, who is found in possession of firearms without valid licence or any weapon, other than the fire arms, in contravention of such a notification under section 4 of the Arms Act, can be prosecuted and convicted but no other persons who is not in possession

of such a weapon can be convicted with the help of section 34 of Indian Penal Code. The principle of joint or vicarious liability on the principle of committing the offence in furtherance of common intention cannot be applied in case of possession of weapon by one of the accused persons. In relation to offence under section 397 and 398 IPC, it is well settled that only the accused, who is in possession of or who uses such a weapon, while committing the offence of robbery, can be convicted but the others accused in the same group cannot be convicted under section 397 and 398 of IPC, if they themselves were not in possession of such a weapon. In view of the language of section 25(1B) Arms Act, same principle and analogy will be applicable to the offence pertaining to section 4 r/w section 25 of the Arms Act also.

10. In the present case, the appellant/accused No.4 was admittedly not in possession of any weapon and therefore, he could not be charged and convicted under section 4 r/w section 25 of the Arms Act. Further as pointed out above the prosecution never pleaded not proved that there was any notification issued by the Central Government under section 4 of the Arms Act for

the area in which these accused persons were found, no offence under section 4 r/w section 25 of the Arms Act could be said to have been committed by the accused persons. In view of these circumstances, the conviction of the accused/appellant under section 4 r/w section 25 of the Arms Act, is liable to be set aside.

11. Appeal is partly allowed. While the conviction and sentence for the offences punishable under sections 399 and 402 of Indian Penal Code are hereby maintained, the Conviction and sentence for the offence punishable under section 4 r/w section 25 of the Arms Act is hereby set aside.

(J.H. BHATIA, J.)